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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-73

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

APPELLANTS,

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

APPELLEES.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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Appellants Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts; Garrett Byrne, District Attorney for the County of Suffolk, and the District Attorneys of all other Counties of the Commonwealth, submit

this statement pursuant to Rule 15, Rules of the Supreme Court of the United States, in support of their claim that this Court has jurisdiction on direct appeal, to review the final order of the United States District Court for the District of Massachusetts referred to herein.

Opinion Below

The opinion of the district court is unreported. The opinion and order of the district court are reproduced as an appendix to this statement.

Jurisdiction

The present appeal is from a final order of a three-judge court of the United States District Court for the District of Massachusetts, constituted pursuant to 28 U.S.C. §§ 2281 and 2284 upon the plaintiff's application for a permanent injunction to restrain the enforcement, operation, or execution of a statute of the Commonwealth of Massachusetts. In the court below the plaintiffs-appellees, William Baird, Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick, M.D., sought an injunction and a declaratory judgment pursuant to 28 U.S.C. §§ 1331, 1343(3); 42 U.S.C. § 1983; and 28 U.S.C. § 2201, claiming that the parental consent requirement for an abortion, Mass. Gen. Laws, c. 112 § 12P, unconstitutionally restricts the performance of abortions in violation of the principles set out in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973).

On April 28, 1975, the district court entered its order together with its opinion, declaring that the parental consent requirement of the statute violated the United States Constitution and enjoining the defendants from enforcing the provisions of the statute as it relates to parental consent. On May 9, 1975, the Court entered a substitute order,

nunc pro tunc, correcting a clerical error in the original order. A notice of appeal was filed with the district court on May 16, 1975.

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1253.

The cases believed to sustain the jurisdiction of this Court are: *Anderson* v. *Martin,* 375 U.S. 399 (1964); *Paul* v. *United States*, 371 U.S. 245 (1963); *Roe* v. *Wade, supra.*

Statutes Involved

The Massachusetts statute involved is Massachusetts General Laws, c. 112, § 12P, which provides:

> (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.
>
> If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.
>
> (2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

Criminal penalties are imposed by Mass. Gen. Laws, c. 112, §§ 12N and 12Q, which provide:

§ 12N: Except in an emergency requiring immediate action no abortion may be performed under sections twelve I or twelve J unless

(1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and

(2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery.

Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services.

§ 12Q: Any person who commits an act in violation of sections twelve L or twelve M shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve L or twelve M which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who willfully violates the provisions of sections twelve N

or twelve O shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars.

The text of the statute is found at page 296 of volume 4 of the Annotated Laws of Massachusetts (The Lawyers Co-operative Publishing Company).

Questions Presented

Is the parental consent provision of Mass. G.L. c. 112, § 12P constitutional?

Are the parents of Mary Moe necessary parties for a just adjudication without whom the complaint should have been dismissed?

Should the district court have appointed a guardian ad litem to protect the interests of the minor plaintiff?

Statement of the Case

On August 2, 1974, the Massachusetts legislature enacted a statute which sought to regulate the performance of abortions within the Commonwealth in accordance with the decisions of this Court in *Roe* v. *Wade,* and *Doe* v. *Bolton.* The pertinent part of the statute prohibited the performance of an abortion upon an unmarried pregnant minor under the age of eighteen[1] without the consent of both parents, except in an emergency requiring immediate action. The physician performing the abortion was made subject to criminal action should he perform an abortion contrary to the requirements of Section 12P. If either one or both of the parents denied their daughter the necessary consent for an abortion, consent could be obtained by order

[1] The term "minors" will hereafter refer to persons less than eighteen years of age.

of the superior court for good cause shown after such hearing as the court deemed necessary. Prior to the effective date of the statute in question, the plaintiffs commenced a class action, seeking a declaratory judgment and a permanent injunction. The plaintiffs are:

1. William Baird, a director and chief counselor of the center operated by Parents Aid Society, also a plaintiff to the present action.

2. Mary Moe I and Mary Moe II both of whom alleged they were prevented by the present statute from obtaining abortions at the Parents Aid Society Abortion Center. They also sued on behalf of all other pregnant unmarried minors.

3. Gerald Zupnick, M.D., the medical director of the Parents Aid Society Abortion Center. He also sued on behalf of his patients, and other physicians similarly situated, and their patients.

4. Parents Aid Society, a not-for-profit corporation organized in Massachusetts, which operates the Parents Aid Society Abortion Clinic.

The defendants are the Attorney General of the Commonwealth of Massachusetts and the District Attorneys of all the counties of the Commonwealth.[2]

The complaint sought temporary, preliminary and permanent injunctive relief prohibiting defendants from enforcing or otherwise implementing the parental consent requirement of Section 12P. In addition, the complaint sought a declaratory judgment that the parental consent requirement violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

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[2] Upon motion of the plaintiffs, all district attorneys of the Commonwealth were included. The original complaint named the District Attorney of Suffolk County as the only party district attorney.

The plaintiffs requests for a temporary restraining order and preliminary injunction were granted by an order of the United States District Judge on October 31, 1974. By virtue of the same order, the plaintiffs request for a three-judge court was granted.

The defendants filed a motion to dismiss and/or for summary judgment arguing that the complaint failed to state a claim upon which relief can be granted; that the court lacked jurisdiction over the subject matter of the complaint; that the plaintiffs failed to join parties under F. R. Civ. P. 19, particularly the parents of the pregnant minor plaintiffs; that the plaintiffs lacked standing; that the plaintiffs action was not ripe for judicial review; and that the district court should abstain. The defendants included a motion for a more definite statement with the motion to dismiss. The motion to dismiss was not separately acted upon by the Court.

On November 19, 1974, Kathleen Roth and other individuals, including Jane Hunerwadel, filed a motion to intervene as defendants on behalf of and as representatives of all parents in the Commonwealth with unmarried minor daughters who are or might become pregnant. The motion to intervene was allowed on November 20, 1974.

At the trial on the merits, Mary Moe, a sixteen year old unmarried minor living with her parents, testified on behalf of "a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." The testimony and all depositions of Mary Moe were impounded by the Court. Additional testimony was presented by experts in the field of psychiatry and medicine.

The intervenor Jane Hunerwadel testified on behalf of the parents of pregnant unmarried minors. Plaintiffs Baird and Zupnick also testified.

Because the orders of the district court restrained the enforcement of the statute prior to their taking effect, there could not be testimony on the extent and scope of the enforcement of Section 12P; nor could there be testimony on the operation and effectiveness of the judicial consent provision of the statute. The sole question that the plaintiffs presented to the three-judge court was whether Section 12P was unconstitutional on its face.

On April 28, 1975, the three-judge court of the United States District Court for the District of Massachusetts issued the order and opinion appended to this statement including the dissent of the senior district judge. The court certified the complaint as a valid class action with Mary Moe, Parents Aid Society, Gerald Zupnick and Intervenor Hunerwadel acting as class representatives. The standing of plaintiff Baird was not passed upon. The defendants contest numerous findings of fact as being unsupported by the evidence. In addition, as more fully set forth in the following section of this statement, the defendants contest the legal conclusions that the district court majority drew from the evidence and from the decisions of this Court.

The Questions Are Substantial

I. Introduction

In essence, the Massachusetts statute under challenge reflects the state's attempt to accommodate the right of a pregnant minor under the Fourteenth Amendment with the rights of parents to play a role in the most difficult judgment affecting the physical and emotional well-being of their minor children. The *Roe* v. *Wade* and *Doe* v. *Bolton* cases did not involve these competing private interests. By contrast the Court is here presented with a statute that

seeks conformity with the prior decisions of the Court and, at the same time, seeks to protect the fundamental interests of both the parents and the child. In footnote 67 of *Roe* v. *Wade, supra* at 165, the Court explicitly left such question for subsequent consideration:

> "Neither in this opinion nor in *Doe* v. *Bolton,* post, p. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are quite aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N. C. Gen. Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional."

The opinion of the majority of the three judge court in this case refers to, and disagrees with, the case of *Planned Parenthood* v. *Danforth,* Civ. No. 74-416 C(A), — F. Supp. — (E.D. Mo. 1975), enforcement stayed 43 U.S.L.W. 3451. The dissent specifically adopts it. Although the statutes of Massachusetts and Missouri differ in some respects,[3]

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[3] Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(4) With the written consent of one parent or person in loco parentis if the woman is unmarried and under the age of eighteen years.

Unless the abortion is certified by licensed physician as necessary in order to preserve the life of the Mother. (Missouri House Bill 1211) *Planned Parenthood* v. *Danforth*, supra at 3.

the issue of constitutionality of parental consent provisions are central to both. Should probable jurisdiction in *Planned Parenthood* v. *Danforth, supra,* be noted by the Court, appellants submit that the instant appeal should be considered in conjunction with *Danforth* in order to provide comprehensive review of the issue raised by the statutes under challenge.

II. The Parental or Judicial Consent Provision of Mass. G.L. c. 112, § 12P Does Not Deprive the Minor Plaintiff of Her Constitutional Rights.

The right to have an abortion as delineated by the Court in *Roe* v. *Wade* and *Doe* v. *Bolton* is not unqualified, but at some point is subject to regulation by the state. As the Court stated in *Roe* v. *Wade*:

> "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154.
>
> "Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at *some* point the state interests as to protection of health, medical standards, and prenatal life, become dominant." 410 U.S. at 155.

To be sure, regulation must be based upon compelling state interests and structured in such a way as to effectuate only those legitimate state interests. *Roe* v. *Wade* did not

consider the scope of the right to privacy as it applies to persons other than a pregnant adult woman. Appellants recognize that a minor possesses a right to privacy, but submit that right is, as in the adult's case, not absolute or unqualified. Moreover, the Court has long recognized that a state has a special interest in regulation where minors are concerned. And in certain circumstances involving acknowledged fundamental rights, a state has been permitted to regulate a minor's exercise of that right to a greater degree than an adult's exercise of that same right. The Court in *Ginsberg* v. *New York,* 390 U.S. 629, 638 (1968), held that where pornographic material was concerned the state has a broader authority over children's activities than over adults:

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather § 484-h simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . ." of such minors. *Mishkin* v. *New York,* 383 U.S. 502, 509; *Bookcase, Inc.* v. *Broderick, supra,* at 75, 218 N.E. 2d, at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . . *Prince* v. *Massachusetts,* 321 U.S. 158, 170."

In assessing the constitutionality of the juvenile court system, this court has hesitated to extend the full panoply of procedural due process guarantees to minors accused of criminal acts. Despite the revolutionary decision in *In re*

Gault, 387 U.S. 1 (1967), the Court has never removed the obstruction between adults and children in the state's criminal process. Since the Court's decision in *In re Gault, supra,* and *In re Winship,* 397 U.S. 358 (1970), the Court has emphasized that the constitutional due process rights extended to adults do not necessarily apply to minors in the criminal justice system:

> "The court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding. What was done in *Gault* and in *Winship* is aptly described in *Commonwealth* v. *Johnson,* 211 Pa. Super. 62, 74, 234 A.2d 9, 15 (1967):
>
> > 'It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend [pointed out in *Kent,* 383 U.S. at 556] whereby "the child receives the worst of both worlds . . ." ' ." *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971).

Likewise, it may be asserted that in the present appeal, the Court must recognize interests other than the minors which are not present in the adult's decision to abort.

Appellants recognize that the state's need to regulate the affairs of minors cannot be asserted in the abstract, thereby drawing a blanket distinction on the basis of age. Rather, where fundamental rights are in issue, appellants perceive that if the state can establish a narrowly defined basis for regulating the affairs of minors in a more extensive way than adults, this Court will accept that regulation. This limited basis has been accepted in *Ginsberg* v. *New*

York, supra, and *McKeiver* v. *Pennsylvania, supra.* Appellants submit that similarly such a basis exists where the state seeks to assure parental involvement in the decisions of a minor to have an abortion.

Courts have long held that under the common law an unmarried minor lacks the capacity to consent to medical treatment, with certain limited exceptions; Morris and Mority, *Doctor, Patient and the Law* (5th ed. 1971) pp. 161-166. Massachusetts courts have uniformly applied this basic restriction on a minor's independent decision to submit to medical treatment. *Reddington* v. *Clayman,* 334 Mass. 244 (1956). See also *Relf* v. *Weinberger,* — F. Supp. — (D. D.C. 1974).

By requiring parental consent for the performance of an abortion, the Massachusetts legislature codified the long-standing common law in its enactment of G.L. c. 112, § 12P. The district court recognized that the ability of the minor to make a considered decision was different from that of adults. At best, it is a factual matter to be determined on a case-by-case method (App. p. 12). The district court failed to then consider how the common law rule serves as a protection against ill-considered decisions in highly stressful situations by involving the parents, the adults who obviously have the greatest interest in the child's welfare. The rule recognizes that all surgical procedures have emotional and physical after-effects. Here, the nature of the decision to abort includes extraordinary emotional and psychological problems which may be alleviated by parental involvement. In addition, the requirement of parental consents for an abortion, as well as other surgical procedures, protects against possible overreaching by the physician. *Dixon* v. *U. S.,* 197 F. Supp. 798, 803 (D.S.C. 1961)

Although the requirement of parental consent affects the exercise of the minor's right to an abortion, the judicial consent provision guards against unreasonable withholding

of such consent to the detriment of the child. The judicial consent provision of Section 12P, rather than infringing upon the existing rights of minors, provides an additional protection usually absent in the parental consent requirement for other surgical operations. The minor may directly seek review in the courts or physicians or health care facilities may petition the court on the minor's behalf.

In its consideration of the judicial review provision, the district court de-emphasized the role of the state superior court and assumed, inappropriately, that the reviewing court will be a "rubber stamp" for the interests of the parents:

> "Whatever may be accorded to the minor by allowing the judicial review 'for good cause shown', we do not regard it as meaning that the court should reverse a refusal of consent it finds reasonably made in the parent's interest". (App. p. 13)

By phrasing the parent's right to deny consent as an absolute veto power, the district court assumes that the state courts will not properly perform their duties to weigh the interests of both parties. If the minor is capable of making an informed and knowing consent, it is proper to expect, until evidence is presented to the contrary, that state courts will uphold the minor's exercise of her constitutional rights. Any other assumption runs counter to this court's continuous concern that state courts be given the opportunity to consider such issues without federal court intervention. See *Huffman* v. *Pursue, Ltd.*, 43 U.S.L.W. 4379 (March 18, 1975); cf. *Younger* v. *Harris*, 401 U.S. 37 (1971).

Other courts which have held similar parental consent statutes to be unconstitutional were not faced with an automatic provision for judicial review as in Section 12P. In *Washington* v. *Koome*, — Wash. — (January 7, 1975)

the statute "[s]ubjected . . . a minor woman's decision to terminate an unwanted pregnancy to absolute and potential arbitrary parental veto . . . ." The only provision for judicial review involved the possibility of juvenile court intervention in cases of parental caprice when the abortion is necessary to save the mother's life. The judicial review provided by Massachusetts is far more open-ended than the judicial remedy in *Washington* v. *Koome, supra.* Thus, the statute creates an entirely new avenue for judicial review rather than further burdening the minor's rights. See also *Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fl. 1973)

The "informed consent" that the state seeks to insure is not limited to surgical questions and the physical effects of the abortion. Involved here are the emotional and social consequences of a minor's abortion decision. Because of the physical, psychological and social effects on the child, it is imperative that the naturally most concerned adults participate in the decision and insure that the minor is in a supportive family environment prior to, during, and following the operation. *Washington* v. *Koome*, supra.

The state also has a compelling interest in protecting the rights and responsibilities of the parent that inhere in the family relationship. The district court erred in finding that the rights of parent and child involved in the abortion decision were adverse. By rejecting the state's interest in protecting the primacy of the family unit through the participation of the parent, the district court raised a substantial federal question.

The Court has consistently held that the rights of parents to provide guidance and input into important decisions affecting their minor children are protected by the Constitution. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). In *Stanley* v. *Georgia*, 405 U.S. 645, 651 (1972), the Court stated:

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), 'basic civil rights of man', *Spinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), and 'rights far more precious . . . than property rights', *May* v. *Anderson,* 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder', *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska, supra,* at 399, the Equal Protection Clause of the Fourteenth Amendment, *Spinner* v. *Oklahoma, supra* at 541, and the Ninth Amendment, *Griswold* v. *Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)."

A state may not unduly interfere with the rights of the parent in the context of the familial relationship, *Wisconsin* v. *Yoder,* 406 U.S. 205, 233 (1972).

In the Court's decisions in *Wade* and *Bolton,* the impact of these substantial interests upon the decision to abort and the individual's right to privacy were not in issue. Not only is the parent-child relationship a sufficient basis for the finding of a compelling state interest, but the relationship is an independent right existing outside the limited interests of the mother's health and the life of the fetus. The fundamental rights of the child must be accommodated with the fundamental interests of the parent within the family context.

The majority below found that:

"All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support if forthcoming is desirable." (App. p. 9)

However, the court did not recognize the compelling interest of the state in protecting the duties and responsibilities of the parents and insuring that the minor female has the desired parental support. The dissent stated:

"Parents have rights and responsibilities that, where in the parent-child relationship, stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and reflect the child's very real need for proper guidance and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest." (App. p. 25)

Placing Section 12P in context with other similar Massachusetts statutes makes clear the state's general concern for protecting the child through a strengthening of the family relationship. See Mass. G.L. c. 209, § 32 (duty to support). A contrary result disregards past precedent of this court and raises fundamental and substantial constitutional questions.

III. The Parents of the Minor Plaintiff Should Have Been Joined as Parties Pursuant to F.R.Civ.P. 19.

As the preceding argument indicates and as Section 12P specifically provides, the parents of unmarried pregnant

minors are given the right to deny consent for an abortion. Whether this right existed prior to the enactment of the statute or was created by it, the parents of Mary Moe have a fundamental interest in the outcome of the litigation. The dissent expressed the failure to include the parents as being a violation of Due Process:

> "The decision of the majority deprives the parents of their parental rights without notice or opportunity, to be heard concerning the existence or extent of those rights. These parents have thus been deprived of their parental rights without due process of law. *Roller* v. *Holly,* 176 U.S. 398 (1900); see *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 123 (1968); Federal Rules of Civil Procedure 12(b)(7) 19; Wright & Miller, Federal Practice and Procedure: Civil § 1602 at 20 (1972). A decision entered in violation of the essential requirements of due process of law is void. *Bass* v. *Hoagland,* 172 F.2d 205, 209 (5th Cir.), *cert. denied,* 338 U.S. 816 (1949); *United States* v. *Manos,* 56 F.R.D. 655, 659, (S.D. Ohio, 1972); See *Roller* v. *Holly, supra.*" (App. pp. 20-21)

In addition to depriving interested parties of their constitutional rights, the failure to include Mary Moe's parents deprived the district court of a fair and complete factual presentation of the issues. The interests of the parents are distinct from those of the named defendants and permitting parties with their own stake in the outcome to characterize the parents' interest was wholly inappropriate.

Without direct evidence about the actual disposition of the parents of Mary Moe, the court could not realistically assess the persuasiveness of her testimony about their antipathy. Accepting such assertions further polarizes family relationships. When actually faced with a troubled

child the interests of parent and child may be far more in accord than either can appreciate in the abstract.

IV. A Guardian Ad Litem Should Have Been Appointed Pursuant to F.R.Civ.P. 17(c) To Protect the Interests of the Minor.

At the same time that Mary Moe's parents were excluded from the proceeding below, the court permitted the interests of Mary Moe to be asserted by the attorney for the other named plaintiffs. The district court assumed that there was no conflict among the interests of all the named plaintiffs and rejected the defendants' contention that a guardian ad litem was necessary:

> Defendants contend that the court should have appointed a guardian ad litem for Mary Moe, citing F.R.Civ.P. 17(c). We do not do so. *Fatima Foe* v. *Vanderhoof,* D. Colo. 2/5/75, — F. Supp. —. In connection therewith we make the following findings. Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent. Finally we observe, although we do not make it a basis for our decision, that insofar as we look to state law, *cf. Marshall* v. *Mulrenin,* 1 Cir., 1974, 508 F.2d 39, the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance no one at all may be representing her." (fn. 5, App. p. 3).

Counsel representing Mary Moe also represented plaintiffs Baird, Zupnick, and Parents Aid Society, Inc., all of whom were instrumental in the performance of the abortion and received fees for their services. (See dissenting opinion, App. pp. 22-23). Thus there was no independent counsel exclusively representing the interests of Mary Moe. Since the focus of the majority's opinion was on the minor's right to privacy, it is only proper that the court insure that her rights are protected against possible encroachment by adults other than her parents. Moreover, a guardian was essential to avoid any potential conflict of interests on the part of counsel for the other plaintiffs.

Rule 17(c) of the Federal Rules of Civil Procedure provides:

> "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the infant or incompetent person."

The Court of Appeals for the Sixth Circuit has addressed the issue of whether Rule 17(c) applies to an abortion situation.

> "We deem the issue particularly critical in this case, where the legal issues are controversial in nature. The plaintiff is a minor, pregnant out of wedlock, without the benefit of a natural parent or guardian, and where her legal guardian is the defendant in the lawsuit.... Moreover since the respective legal positions of the child and guardian are adverse in this lawsuit, it cannot be said that the plaintiff is 'otherwise represented' in the action as provided in Rule 17(c). While it would not be at all improper for the

> court, upon consideration, to appoint the child's attorney as her guardian ad litem, the mere presence of an attorney representing her in the action is insufficient of itself to protect her personal interests in the action. We stress the obligation of the trial judge to exercise his discretion, bearing in mind the very real need of a 14-year-old plaintiff to have her own personal rights and interests protected". *Noe* v. *True*, 507 F.2d 9, 11-12 (6th Cir. 1974).

The principles articulated by the Sixth Circuit make a compelling argument for the appointment of a guardian, who will provide the fundamental need of protecting the interests of the minor throughout the litigation.

Conclusion

The questions presented by this appeal are substantial and warrant plenary consideration by the Court. Probable jurisdiction should therefore be noted and the case set down for argument.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

Before ALDRICH, *Senior Circuit Judge,*
JULIAN, *Senior District Judge*
and FREEDMAN, *District Judge.*

OPINION

April 28, 1975

ALDRICH, *Senior Circuit Judge.* This is an action, brought as a class action, to enjoin, as unconstitutional on its face, the enforcement of a Massachusetts statute, Mass. G.L. c. 112, § 12P, enacted to take effect November 1, 1974, by Mass. Acts 1974, c. 706. The statute makes it a criminal offense to perform an abortion upon a minor without the consent of both parents as well as that of the minor, with certain exceptions, the most important being that the

parents' refusal may be overruled by a superior court judge "for good cause shown." The pertinent paragraph reads as follows:

> "Section 12P(1). If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother."

Standing.

Plaintiffs are William Baird; Mary Moe I, hereinafter Mary Moe;[1] Parents Aid Society, Inc., hereinafter Parents Aid, and Gerald Zupnick. Defendants are Francis Bellotti, Attorney General of the Commonwealth;[2] Garrett Byrne, district attorney for the County of Suffolk, and the district attorneys of all other counties in Massachusetts. Intervening defendants are Kathleen Roth *et al.*, whom we permitted to intervene on behalf of, and as representative of, Massachusetts parents having unmarried minor daughters who are, or who might become,[3] pregnant. No evidence or stipulation was introduced as to any intervenors except Jane Hunerwadel. To be consistent, n. 1, ante, we must dismiss as to all the others. Mrs. Hunerwadel has three minor daughters, one in her teens, none pregnant as far as she knows. Like defendants, she does not know the identity of Mary Moe, and represents her only in the

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[1] Three other Mary Moes were named, but no evidence supporting their standing was introduced, and we dismiss as to them for want of proof.

[2] Replacing Robert Quinn, the incumbent at the time this action was brought.

[3] Plaintiffs object to the latter's standing, citing Mr. and Mrs. Doe in *Roe* v. *Wade*, 1973, 410 U.S. 113, 128. We think the situation distinguishable.

general sense that she may represent parents of all nubile minor females in Massachusetts who may, in their opinion unwisely or improperly, wish to have an abortion without informing them.

Plaintiff Mary Moe is an unmarried minor residing at home with her parents in Massachusetts. At the time of the institution of the action she was 16 years of age and about 8 weeks pregnant.[4] She has not informed her parents of her condition, and does not wish to. Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boy friend. She did not know how far to believe this, except that she felt certain he would take some physical action against the boy. The boy, also 16, was a three-months acquaintance with whom she is no longer associating. Her relations with and affection for her family are "average good." There was no sexual instruction, no one caring to initiate the subject. There is no religious factor. She knew vaguely about contraception, but had no access to materials, and "didn't care to wait until [she] was 18." Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings. She did confide in her older sister. Pregnancy would not have kept her from attending school.[5]

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[4] Mary Moe has since had an abortion, performed by Dr. Zupnick following a restraining order issued in this case suspending the operation of the statute. It is not suggested that this moots the action as to her. *Roe* v. *Wade*, ante, 410 U.S. at 125.

[5] Defendants contend that the court should have appointed a guardian ad litem for Mary Moe, citing F.R.Civ.P. (17c). We do not do so. *Fatima Foe* v. *Vanderhoof*, D.Colo., 2/5/75, ___ F.Supp. ___. In connection therewith we make the following findings. Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her

In connection with Mary Moe's capacity to represent a plaintiff class, F.R.Civ.P. 23(a)(4), we find, following examination and cross-examination in camera, that she is of average intelligence and awareness; that her emotional age at least corresponds with her chronical age, and that she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort, and that she was competent to make and effectuate that decision. If relevant, she did not learn of the other plaintiffs until someone else had determined that she was pregnant. We find that she is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents. This, of course, requires standing, but there can be no question of Mary Moe's standing to bring this action. Though the statute does not in terms subject her to criminal liability, its enforcement[6] would prevent her, absent violation by someone, from obtaining an abortion without compliance with its terms. Thus, she exhibits "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr*, 1962, 369 U.S. 186, 204,

interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent. Finally, we observe, although we do not make it a basis for our decision, that insofar as we look to state law, *cf. Marshall* v. *Mulrenin*, 1 Cir., 1974, 508 F.2d 39, the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance no one at all may be representing her.

[6] Suit was brought shortly before the effective date of the statute and a restraining order was promptly issued. This order has since been continued without a separate hearing for a preliminary injunction with at least the tacit consent of the defendants, first because of their need for depositions, and thereafter because of scheduling difficulties with respect to their witnesses.

thereby demonstrating "a logical nexus . . . between the status asserted by the litigant and the claim [she] presents ...." *Flast* v. *Cohen*, 392 U.S. 83, 102. *See Roe* v. *Wade*, ante, 410 U.S. at 124, *Abele* v. *Markle*, 2 Cir., 1971, 452 F.2d 1121, 1125.[7]

Plaintiff William Baird is the founder and director of plaintiff Parents Aid. He describes himself as being, among other things, a pioneer and advocate for the free availability of abortions. He has a strong personal interest in that sense, but no financial or other tangible concern. *But cf. Sierra Club* v. *Morton*, 1972, 405 U.S. 727, 738; *Data Processing Service* v. *Camp*, 1970, 397 U.S. 150, 154. Baird claims standing because he wishes to assist Parents Aid, which allegedly, if the statute were in force, would make him an accessory. *See Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 481. Arguably, this is too remote an interest to confer standing. If any citizen who might like to violate a law may contest it, the doctrine of standing would be meaningless. *Cf. Roe* v. *Wade*, ante, 410 U.S. at 128, and cases cited. On the other hand, Baird's contemplated activities are far less speculative than those there found insufficient. As director of Parents Aid, Baird for some time provided minors with abortion counseling and services, and the mere continuation of this activity, the mere preservation of the status quo, would subject him to criminal liability. *Cf. Griswold*, ante, 381 U.S. at 481; *Abele*, ante, 452 F.2d at 1125. In the light of the unassailable standing of other plaintiffs, however, *see* post, we do not pass on the question of Baird's standing.

[7] We do not agree with defendants' insistence that in order to have standing Mary Moe must first exhaust the statutory conditions. *Cf. McNeese* v. *Board of Education*, 1963, 373 U.S. 668, 670-72. By this, apparently, they mean that she should have first informed her parents to seek their consent (and had it refused), one of the very requirements she contests. One does not have to comply with a statute in order to challenge its constitutionality.

Plaintiff Parents Aid is organized as a Massachusetts non-profit corporation. It provides, through its medical director and supporting personnel, abortions for varying fees, depending upon ability to pay. About 15% it performs without charge. The Society's standing is conferred not only by its direct subjection to criminal liability, but also by the recognition that even general enforcement of the statute against physicians alone would seriously interfere with its ongoing activities. *Doe* v. *Bolton*, 1973, 410 U.S. 179, 188; *Truax* v. *Raich*, 1915, 239 U.S. 33, 38-39.

Plaintiff Gerald Zupnick, a resident of New York, is a physician licensed in Massachusetts, and is Parents Aid's medical director. He works regularly at the latter's place of business two days a week, performing abortions on a fee basis. Dr. Zupnick's standing in this action is beyond question. The statute at issue applies directly to his activities, and although Dr. Zupnick was receiving a substantial income from performing these procedures, we credit his testimony that the threat of prosecution would force him to cease.

We find that Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. From the standpoint of their being due and adequate class representatives, we find they have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all.

Before leaving the question of standing we note that Parents Aid and Dr. Zupnick by hypothesis cannot lawfully, with exceptions too unusual for us to be concerned with, perform abortions upon minors incapable of consenting. Nonetheless, we hold that they do have standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents. We find nothing about abortions that requires the minor's interest to be

treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed on the consent of one parent.

Controversy.

Defendants contend that there is no "case or controversy" because none of the plaintiffs has been actively, or affirmatively, threatened with criminal proceedings. However, this is not the test. Plaintiffs need not act so as to precipitate their prosecution under a statute they wish to challenge as unconstitutional in order to constitute a case or controversy. Nor must they show that prosecution has been actively or verbally threatened in order to establish that the government's posture is adverse. *See Doe* v. *Bolton,* ante. 410 U.S. at 188. Rather, we must make a realistic appraisal of the total circumstances to determine whether the prospect of enforcement of the statute is "chimerical," *Steffel* v. *Thompson*, 1974, 415 U.S. 452, 459, or "concrete," *Aetna Life Ins. Co.* v. *Haworth*, 1937, 300 U.S. 227, 240. *Cf. Younger* v. *Harris*, 1971, 401 U.S. 37, 42; *Abele,* ante, 452 F.2d at 1125; *Acevedo Montalvo* v. *Hernandez Colon,* D.P.R., 1974, 377 F.Supp. 1332, 1334 (per curiam). We find that the subject of abortions has excited a great amount of feeling in Massachusetts; that the defendants, as is evident from their activities in this case, are satisfied that the statute is constitutional; that there will be extensive pressure upon them to prosecute in case of a violation, and that it is highly improbable that they would not immediately respond to such pressures. Baird testified that he had been arrested without warning in connection with the Massachusetts birth control statute, so-called, and we believe that public opposition to abortion is more organized and more vocal than was the opposition to birth control. Under all the circumstances we find that plaintiffs had every reason to believe that they had only

two alternatives, to continue their current activities and face immediate arrest, or to bring the present suit.

The "controversy" requirement, like the standing requirement, is to assure that there will be a vigorous contest with active participation on both sides by parties immediately interested, as distinguished from parties engaging in theoretical disputes as an intellectual pastime. *See Roe* v. *Wade*, ante, 410 U.S. at 123; *Golden* v. *Zwickler*, 1969, 394 U.S. 103, 108; *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 273. It is correspondingly requisite that the court's time not be wasted. We find that the present case fits the requirements in both respects, and hold that there is sufficient controversy.

The Underlying Facts.

We were offered nearly three days of testimony. The principal purpose, as we gather it, was to demonstrate on the one side the need, and on the other the objections; the interests served, and the interests countered, by the statute. In some areas there was considerable disagreement between the experts. We do not propose to resolve those disagreements. Even though in some instances our findings might not correspond with defendants' experts, we may accept their factual evidence for present purposes in cases of conflict because, either way, our ultimate conclusions would be the same. It is to be understood that throughout this opinion, unless the contrary is noted, we are talking about abortions during the first trimester.

There are presently three common methods of performing an abortion; injection of a saline solution; the so-called vacuum method, and a hysterotomy. The first two are performed under local anesthesia. The vacuum procedure, apparently the one generally performed by Dr. Zupnick, requires five to seven minutes. It is followed by minor bleeding and occasional pains, spanning perhaps three to

six weeks. There is a possibility of infection and other complications, as with any procedure, and there is a possibility, minor, or very remote, depending on whose testimony is accepted, of subsequent sterility. Plaintiffs' doctors, who had performed a very substantial number of first trimester abortions, gave a very low percentage of complications or "morbidity" in the case of lawful, as distinguished from illicitly performed abortions. Defendants' doctor's considerably higher figure we attribute to the fact that he does not do abortions as such, but only "terminates pregnancy" when there is already some medical necessity. Even he did not suggest any greater risks for minors than for adults.

In addition to such physiological risks, there are possible emotional risks. Abortion is commonly looked upon as offering "instant relief." In many cases this may be so, but in some it may be followed by various feelings of guilt. We also respect defendants' expert's view that it is undesirable to make too speedy a decision. At the same time we note his opinion that this decision, as the minor reaches the end of the first trimester, has great psychological as well as medical weight, and should be made as soon as possible.

All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support, if forthcoming, is most desirable. Probably most parents are supportive. We are obliged to find, however, that an appreciable number are not, for a variety of reasons. Moreover, as may be the case with Mary Moe's father, parents may seek to control sexual behavior by threats that they do not mean, or would not carry out in the actual eventuality, but which nonetheless serve to destroy intercommunication.

We must find, however, that a significant number of minors who are capable of consenting are unwilling to tell

their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want.

There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the minor's own consequent feelings. While we shall not deal with this aspect further, we note that in a very real sense it precisely fits standard concepts of the right of privacy.

From the standpoint of parents, we believe that most would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive. However, we cannot think that all would be. We accept the testimony of plaintiffs' experienced expert that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson. We might find difficulty in regarding this reaction as other than unusual if we did not recall that the Commonwealth itself argued in *Baird* v. *Eisenstadt,* 1 Cir., 1970, 429 F.2d 1398, 1401, *aff'd,* 405 U.S. 438, that the prevention of fornication is so important that it justified withholding birth control devices from unmarried adults, with the resultant risk of pregnancy. The fact that the Court of Appeals expressed shock at this view does not mean it does not exist, but merely illustrates the degrees of variance and the strength of opinions on this subject.

Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant

woman. This leads to the significant contention pressed upon us by defendants as well as by intervenor, that some parents believe that they have separate rights as parents, and that there is a family interest, separate and apart from that of the minor. These interests, which are asserted to be of constitutional proportions, they variously describe as "parents' liberties;" the parents' right to "control," and their right to "promote and preserve the family as an important societal unit." These rights, being, by hypothesis, antithetical to the minor's, it may not be unnatural for the minor to feel that she is in trouble enough without having to become subservient to claims of others.

We have not stated all of the factual issues in this difficult area, but we believe we have stated enough to delineate the issues for present purposes. More facts will appear later when relevant.

The Minor's Consent.

The greatest divergence in the testimony related to the capacity of minors to give an informed consent.[8] At one extreme, Baird testified that in his many years experience he had never met a minor who was incapable, a conclusion supportable only on a hypothesis, which we reject, that an abortion, if not medically contra-indicated, is always the best solution, so that a minor who wants one must be presumed capable. We are also not impressed by the observation in *Washington* v. *Koome,* Wash., 1975, 530 P.2d 260, which recognized a 16-year old's consent, that "[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for

[8] We are not dealing in this case with legislation directed to the legal capacity of minors to consent to a medical or surgical procedure. *Cf. Younts* v. *St. Francis Hospital and School of Nursing, Inc.*, Kan., 1970, 469 P.2d 330, 336-38; *Smith* v. *Seibly*, Wash., 1967, 431 P.2d 719, 722-24. For reasons we shall come to, the statute goes far beyond such a principle.

a legal one." Fertility marks a physical, not emotional or intellectual maturity, and a "fertile" minor may become pregnant precisely because she lacks the capacity to reason and consent maturely. No expert testified that every minor of any age was able to make a considered decision.[9] Of necessity, there will be factual questions to weigh in each case.

Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. Whatever may be the value of conclusive presumptions making the 18th birthday a turning point for such matters as voting, the purchase of liquor, and entering into contracts other than certain contracts for necessaries, *cf. J. G. Pierce Co.* v. *Wallace,* 1925, 251 Mass. 383, we can attach no such factual magic to that birthday. We may also remark, parenthetically, that it is singular for the state to provide that a minor may consent to intercourse at age 16, Mass. G.L. c. 265, § 23 (statutory rape), but cannot consent to get rid of the product until she is two years older. But whichever experts are correct, it is enough for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent. Our overall question, accordingly, is whether the state can be permitted to restrain the free exercise of that consent, to the extent that it has endeavored to do so.

We consider first what the statute does not do.

1. The statute does not purport to require simply that parents be notified and given an opportunity to communi-

[9] We find quite credible defendants' expert who testified that at certain periods of their lives adolescents might react maturely one day and immaturely the next.

cate with the minor, her chosen physician, or others. We mention this obvious fact because of the persistence of defendants and intervenors in arguing that the legislature could properly enact such a statute. Whether it could is not before us, and there is no reason for our considering it.

2. The statute does not exclude those capable of forming an intelligent consent, but applies to all minors. The statute's provision calling for the minor's own consent recognizes that at least some minors can consent, but the minor's consent must be supplemented in every case, either by the consent of both parents, or by a court order.

3. The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely, that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents.

4. The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognizes and provides rights in both parents, independent of, and hence potentially at variance with, her own personal interests. On being told by the court during argument that this appeared to be the statutory meaning, counsel agreed. It is the Commonwealth's position "that a parent in the decision-making process can consider interests other than the minor's. . . . The concept of liberty . . . embraces parental rights of supervision and control over children, and really what we are dealing with are competing rights of a constitutional dimension." Intervenor took the same position. We agree that this is the clear statutory intent. Whatever may be accorded to the minor by allowing her judicial review "for good cause shown," we do not regard it as meaning that the court should reverse a refusal of consent it finds reasonably made in the parent's interests.

5. As a corollary to the foregoing, the statute is not to be weighed in terms of permissible overbreadth, unavoidably applying to minors in fact capable of consenting because necessary for proper administration or enforcement with respect to minors considered incapable. The legislature made no such determination. Rather, the direct purpose is to encumber the rights of all minors facially coming within its terms.

We make this extensive analysis, which we take it all parties are in agreement with,[10] to demonstrate the two basic issues: the minor's personal rights, and the separate rights of the parents.

The Minor's Rights.

Passing for the moment the question whether there are conflicting rights, there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age. While the Court in *Roe* v. *Wade,* ante, 410 U.S. at 165 n.67, failed to pass upon whether there were any special rights in the state, or elsewhere, that could be of greater significance when the female is a minor, the Court in no way suggested that a minor lacked personal rights. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re Gault,* 1967, 387 U.S. 1, 13; *see Coe* v. *Gerstein,* S.D.Fla., 1974, 376 F.Supp. 695, 698; *Merriken* v. *Cressman,* E.D.Pa., 1973, 364 F.Supp. 913, 918-19; *Washington* v. *Koome,* ante, 530 P.2d at 263; Note, the Minor's Right to Abortion and the Requirement of Parental Consent, 1974, 60 Va.L.Rev. 305, 316-19. *Cf. In re Winship,* 1970, 397 U.S. 358, 365; *Stull* v. *School Board of Western Jr.-Sr. High School,* 3 Cir., 1972, 459 F.2d 339, 345. We see no room

[10] The dissent is seemingly of the opinion that a reviewing Superior Court judge would consider only the interests of the minor. We find no room in the statute for so limited an interpretation.

cannot be subordinated to the state any more than can be an adult's. We say this because, as previously pointed out, the statute is cast not in terms of protecting the minor, *cf. Ginsberg* v. *New York,* 1968, 390 U.S. 629, 638; *Prince* v. *Massachusetts,* 1944, 321 U.S. 158, 168, but in recognizing independent rights of parents. In this circumstance the statute does not attain validity vis-a-vis the minor by virtue of her ability (such as it is) to appeal to a Superior Court judge; this is merely a constraint on the assertion of unreasonable claims of her parents. The question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own?

The Competing Rights of Parents.

The importance of the last-mentioned distinction is not to be overlooked. It is not to deny parents all rights if we invalidate this statute. As intervenor herself well illustrated, parents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before. And we may wonder, also, whether imposing such burden on the minor would necessarily improve the family relationship. But this, as we have said, is not the statute's aim. The parents not only must be consulted, they are given a veto. Defendants do not like this word. The fact, however, that because of the right of appeal this veto may not be absolute, modifies it only to a degree. So long as parents' independent rights may be enforced, they remain formidable.

Except to assert that such rights exist, defendants and intervenor do little to demonstrate why parents should be granted individual rights independent of the minor's best interests. It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it

in all senses, financially and otherwise.[11] It is difficult to think of any self interest that a parent would have that compares with those significant interests of the pregnant minor.

Turning from discussion to decided authority, the cases cited by defendants and intervenor involving rights of parents uniformly concern situations where the parents' claimed rights are compatible with the minor's, not adverse. Such cases are of no assistance. Of course parents have rights in proper instances, to act in their children's interests. What is claimed here is something altogether different. But even if it should be found that parents may have rights of a Constitutional dimension vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected. The single exception to this is *Planned Parenthood* v. *Danforth,* E.D.Mo., (1/31/75). We do not agree with the majority opinion.

Consequently, the parental consent requirement of Massachusetts General Laws, Chapter 112, Section 12P, is constitutionally invalid. Judgment will be entered permanently enjoining defendants from enforcing Chapter 112, Section 12P, as it relates to parental consent in any fashion. Plaintiffs to have their costs. Attorneys' fees against defendants are denied.

So ordered.

(s) BAILEY ALDRICH
U. S. Circuit Judge
(s) FRANK H. FREEDMAN
U. S. District Judge

[11] If we may take note of a comment made by a defender of such statutes on W. Buckley's *Firing Line*, Feb. 9, 1975, Southern Educational Communications Ass'n, Publisher, that having refused consent for an abortion the parents "assume a major responsibility to the infant who is going to be born," one may hope this would be so, but it would be naive not to envisage many exceptions. The statute places the burden of all exceptions on the minor.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

Before ALDRICH, *Senior Circuit Judge,*
JULIAN, *Senior District Judge,*
and FREEDMAN, *District Judge.*

DISSENTING OPINION
April 28, 1975

JULIAN, S.D.J. (dissenting):

I disagree with the decision of the majority. I would hold that the challenged statute [1] is constitutionally valid.

[1] That statute, Mass. G.L. c. 112, § 12P, provides:

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her

It is also my opinion that in these proceedings the defendants and the parents of "Mary Moe," the 16-year-old plaintiff, have been deprived of their legal rights without due process of law.

I shall address the latter issue first.

The minor plaintiff in this case is an unemancipated, unmarried, high-school girl living with her parents and the rest of their family. At the time this action was brought she was pregnant and had been for about eight weeks. Within a matter of hours after the single judge issued a temporary restraining order enjoining the enforcement of the statute, Dr. Zupnick, a plaintiff, performed the

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family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section 12R."

If the written consent of the proper person or persons has not been delivered to the physician performing the abortion as set forth in § 12P, and if an emergency requiring immediate action does not exist, no abortion may be performed. Mass. G.L. c. 112, § 12N. Any person who willfully violates the provisions of § 12N shall be fined not less than $100 nor more than $2,000. Mass. G.L. c. 112, § 12Q. The statute also allows the attorney general or any person whose consent is required pursuant to § 12P or common law to petition the state's superior court for an order enjoining performance of an abortion that may be performed contrary to the provisions of c. 112, §§ I-Q. Mass. G.L. c. 112, § 12R.

Roe v. *Wade*, 410 U.S. 113 (1973), at 153-154, 163, requires that a woman who consents to an abortion must also obtain the consent of a physician. Mass. G.L. c. 112, § 12P, also requires an additional consent when a minor is to have the abortion—the consent of the minor's parents, and further provides that if the parents do not consent, the consent may be obtained by court order.

abortion on the girl. Her parents were not consulted. They have no knowledge of the girl's pregnancy or of the abortion. They have no knowledge of the pendency of this action. The majority of the Court denied defendants' motion that the parents be joined as parties to the action. The name "Mary Moe" is a fictitious name. She has withheld from her parents all information concerning her pregnancy and the abortion. She has been permitted by the Court to withhold her name and address and the names and address of her parents from the defendants as well as from the Court itself. The majority went further and ordered the defendants not to make any attempt to discover her identity or the identity of her parents.[2] The majority have thus made it impossible for the defendants to call the parents as witnesses at the trial or to take their depositions. The minor testified at the trial and the majority have made findings of material facts on the basis of her uncorroborated testimony. Some of the findings relate to the parents and reflect adversely upon their performance of their parental duties. The concealment of the identity of the parents precluded the defendants from rebutting the girl's testimony and from impeaching her credibility. They were also precluded from presenting evidence concerning the degree of maturity that the girl had attained[3] and the competence, fitness and willingness

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[2] Appropriate precautions to prevent public disclosure of the minor's identity would have sufficed. There was no need for the Court to suppress the disclosure of probable sources of relevant evidence.

[3] The majority find as a fact that "Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action." The evidence before this Court is insufficient to justify such a finding. Plaintiff minor has not been shown by the evidence to possess a higher degree of intelligence than the average adolescent of her age. Based on the general experience of mankind, judicial notice may be taken that the average adolescent of sixteen does not "fully understand" the difficult substantive issues raised by this action.

of her parents to act as her guardians in this litigation and look after her best interests.[4]

Adjudication of this case significantly affects constitutional, statutory and common-law rights of the parents. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 68 U.S. 223, 233 (1863), as quoted approvingly in *Goss* v. *Lopez,* 43 U.S.L.W. 4181, 4185 (U.S. Jan. 22, 1975).[5] Since the majority have made this a class action,[6] the temporary restraining order issued by a single judge and extended by the majority irreparably abridged not only the rights of the parents of plaintiff Mary Moe, but also the rights of the parents of all unmarried pregnant minors under the age of 18, that is, girls from about 12 years of age through 17, whose daughters have been aborted without any notice to the parents. The decision of the majority deprives the parents of their parental rights without notice or opportunity to be heard concerning the existence of those rights. These parents have thus been deprived of their parental rights without due process of law. *Roller* v. *Holly,* 176 U.S. 398 (1900); see *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 123 (1968); Federal Rules of Civil Procedure 12(b)(7), 19; 7 Wright & Miller, Federal Practice and Procedure: Civil § 1602 at 20 (1972). A decision entered in violation of the essential requirements of due

[4] The courts require a strong case to be made before they will interfere, or permit strangers to interfere, with the parents' guardianship. See, generally, "Readings in the History and System of the Common Law," Pound and Plucknett, 3d ed., 1927, at p. 496.

[5] *Roller* v. *Holly*, 176 U.S. 398, 409 (1900): "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; . . . ."

[6] In my view, the majority have failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure relating to class actions.

process of law is void. *Bass* v. *Hoagland,* 172 F.2d 205, 209 (5 Cir.), *cert. denied,* 338 U.S. 816 (1949); *United States* v. *Manos,* 56 F.R.D. 655, 659 (S.D. Ohio, 1972); *see Roller v. Holly, supra.*

The majority have deprived the parents of the minor plaintiff of their parental rights without due process of law. The procedure followed in this case has also effectively deprived the defendants and intervenor of their right to call and examine witnesses before and during trial and to test the veracity of the minor plaintiff as a witness.

In addition to refusing to permit joinder of the parents as parties to this action, the majority have refused to appoint a guardian ad litem for the minor, thus leaving her without the protection of her natural guardians and of a court-appointed guardian.

The majority's stated reason for its failure to appoint a guardian ad litem for the minor is that

> "Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent."

Counsel for the plaintiffs was never appointed guardian ad litem for the minor plaintiff and never purported to act as her guardian. At no time before or during trial was he ever informed that he was guardian ad litem for the minor plaintiff. Except as to the issue of the constitutionality of the state statute, the record fails to disclose that counsel for the plaintiffs had the slightest concern for the welfare of the minor plaintiff. The record shows that his sole objective was to have the state statute declared unconstitutional for the benefit of the adult and corporate plaintiffs by eliminating it as a legal obstacle to the performance of abortions on minors under the age of 18. The Court should have appointed a guardian ad litem for the minor

plaintiff to ensure proper representation of her interests. See Federal Rules of Civil Procedure 17(c).

Counsel for the minor plaintiff and her "class" was also counsel for the other plaintiffs whose real interests conflicted with those of the minors. The plaintiffs other than the minors receive substantial income from the abortions performed on minors and thus have a financial interest in the outcome of this litigation. Parents Aid Society, Inc.,[7] receives fees for abortions which it shares with the abortionist, Zupnick.[8] Baird insists that he does not receive

[7] On all the pertinent evidence it is more probable than not that Parents Aid Society, Inc., is Baird's alter ego.

[8] Zupnick lives in New York. He commutes to Boston to perform abortions on two days each week. The Boston abortions are not the full extent of his practice, however. Zupnick also performs abortions in New York two days each week. Zupnick's medical practice is limited to performance of first trimester abortions in facilities of Parents Aid Society, Inc., in Boston and New York. Zupnick is paid well, as his testimony shows:

"Q. Is there a maximum price for an abortion at Parents Aid Society?

"A. Yes. The abortion fee is on a sliding scale from the patient's ability to pay to a maximum of $150.

"Q. In the case where $150 is charged, what do you receive in that instance?

"A. Usually a third.

"Judge Freedman: Is that paid on a monthly basis?

"The Witness: No. It is paid on a daily basis. I am given a check at the end of the day.

"Q. What was the amount of the last check that you received from the Parents Aid Society?

[An objection is stated and overruled]

"A. I honestly don't recall the exact figure. I believe it was in the area of $600.

"Q. You have received checks higher than that amount?

"A. Higher and lower, yes.

"Q. Does that constitute reimbursement for two days work?

"A. That is correct.

* * * * *

"Judge Freedman: I would be interested, Doctor, in the number of abortions you performed—the percentage of those that incorporate fees of the maximum $150 as opposed to those that are actually free.

funds from Parents Aid Society, Inc.: "[N]ot one penny has come to me in eleven years." (December 31, 1974, Tr. p. 120). Baird's wife, however, receives funds from Parents Aid Society, Inc., in Baird's words: "because I was not earning enough money to feed her and the family." (*Id.*)

The plaintiffs, including the minor, were represented by the same counsel. Parents Aid Society, Inc., Zupnick, Baird, and Baird's wife and children, however, directly or indirectly, derive financial advantage from the abortions. The financial interests of those plaintiffs, however, are in conflict with the minor's "very real need . . . to have her own personal rights and interests protected." *Noe* v. *True*, 507 F.2d 9, 12 (6 Cir. 1974).

The interests of the minors in this litigation are of a different nature and far more important than the monetary interests of the other plaintiffs. They are in collision and should not have been represented by the same counsel. Advocacy on behalf of the minor should have sought to protect her from possible overreaching on the part of adults such as Baird or Zupnick. No consideration appears to have been given to the possibility that the abortion may have been adverse to her best interests. Counsel made

"The Witness: As I said before, it is not always free or $150. It is on a sliding scale basis. If you are asking me how many patients pay the total of $150 fee—

"Judge Freedman: Yes. How many people pay no fee on a percentage basis?

"The Witness: I would say probably about two-thirds pay the $150 fee and probably about 15% are done for free, and then there is a scale in between on the other patients. . . .

* * * * *

"Q. When the patient walks into the operating room, typically that is the first time she has met you?

"A. Usually, yes.

"Judge Freedman: How long does the typical abortion procedure last?

"The Witness: The average technical part of the procedure is five to seven minutes."

(December 31, 1974, Tr. pp. 15-17, 28.)

no attempt to determine the emotional impact the abortion might have on her.

The interests of the minor plaintiff were not adequately represented. The Court should not have deprived the minor of the guidance, counsel and care that her parents were under a legal obligation to provide, and might have provided if her condition had not been concealed from them. If the parents had been informed and nevertheless had failed to act, the Court should have assumed the ultimate responsibility for any determination made on behalf of the minor by appointing a guardian ad litem.[9] See *Noe* v. *True*, 507 F.2d 9, 11-12 (6 Cir. 1974).

The majority find that Mary Moe was competent to make and effectuate the decision to abort. The majority also find there are other unmarried pregnant minors in Massachusetts who have adequate capacity to give a valid and informed consent to an abortion. These findings are not warranted by the evidence.

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[9] In *Foe* v. *Vanderhoof*, Civ. A. No. 74-F-418 (D. Colo., Feb. 5, 1975), which is relied upon by the majority, the court did not appoint a guardian ad litem. The court found the emancipated minor plaintiff's interests were fully protected by her counsel and social worker. Counsel, however, did not represent conflicting interests. Moreover, the *Vanderhoof* court found that the plaintiff had met with her mother, doctor and social worker to discuss her pregnancy, abortion procedures and the consequences of the decision. The *Vanderhoof* court also appointed an obstetrician and a psychiatrist to examine and counsel the plaintiff. The appointed doctors agreed she should have an abortion. The *Vanderhoof* court thus assumed responsibility for determinations made on the minor's behalf. In contrast with the meticulous procedure in *Vanderhoof*, Mary Moe, for example, had perfunctory contact with the attorneys and abortionists. No professionals were appointed to examine or counsel her prior or subsequent to the issuance of the temporary restraining order or performance of the abortion. The majority's failure to take any precautions for the protection of the minor's best interests is particularly ironic since Mass. G.L. c. 112, § 12P, which the majority strike down, allows recourse to the state court when parental consent is denied. The state court would have been able to protect th minor's best interests as did the *Vanderhoof* court.

In order for consent to be informed, a minor must understand the emotional as well as the physical consequences which may follow from an abortion. The testimony of the psychiatrists is unanimous on this point. Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, December 30, 1974, pp. 118, 127-132; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, January 28, 1975, pp. 50-52. No testimony was offered, however, concerning the emotional consequences the abortion may or will have upon Mary Moe. No testimony was presented concerning Mary Moe's understanding of those consequences or her ability to understand them. In making their findings the majority must necessarily have applied a test of informed consent which looks only to the minor's ability to understand the consent form, surgical procedure and direct physical effects. The majority disregard that aspect of informed consent which requires that a minor must understand the emotional consequences which may follow an abortion.

Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest.

The liberty guaranteed by the Fourteenth Amendment "denotes . . . the right of the individual . . . to marry, establish a home and bring up children, ..." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). The Constitution guarantees

> "the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Pierce v. *Society of Sisters,* 268 U.S. 510, 534-535 (1925). See *Roe* v. *Wade,* 410 U.S. 113, 152-153 (1973); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); see also *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975). This right and duty of the parents to prepare the child for additional obligations "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin* v. *Yoder,* 406 U.S. 205, 233 (1972).

The Commonwealth of Masachusetts recognizes that a child benefits from parental guidance and protection and fully acknowledges the freedom and responsibility of parents to direct the upbringing of their children. *Commonwealth* v. *Brasher,* Mass. , 270 N.E.2d 389, 394 (1971).[10] Indeed, it is the articulated policy of Massachusetts to strengthen and encourage family life for the protection and care of the child. Mass. G.L. c. 28A, § 1; c. 119, § 1.

The question of the constitutionality of statutes requiring parental consent to the abortion has been explicitly left open in *Roe* v. *Wade,* 410 U.S. 113 (1973).[11] There is nothing in that opinion or in the opinion in the companion

[10] Mass. G.L. c. 112, § 12P, is one of many state statutes designed to protect the child from her own improvidence and from overreaching by adults by requiring parental consent as a prerequisite to the child's engaging in a specified activity. *E.g.*, Mass. G.L. c. 131, § 14; c. 140, §§ 131, 179; c. 207, § 7; c. 208, § 30; c. 210, § 2; c. 248, § 35; c. 272, § 1.

[11] At page 165, n. 67, the Court stated: "We need not now decide whether provisions of this kind [provision requiring parental consent] are constitutional."

case of *Doe* v. *Bolton, id.,* at page 179, that abrogates or erodes the rights and responsibilities of parents. Those decisions do not remove the pregnant, unemancipated minor from the care and custody of her parents. The parents still remain her natural guardians with undiminished responsibility for her welfare.

The State parental consent statute protects an interest which is completely separate from the State's interest in the protection of the pregnant woman's health or the unborn child's life. The statute protects the right of the parents to the liberty guaranteed them by the Fifth and Fourteenth Amendments. The statute protects the family relationship, the right and duty of parents to bring up their child, the right and duty of parents to inculcate moral standards; the statute provides protection for the parents' right and duty to make reasonable decisions, in the first instance, for the control and proper functioning of the family as a harmonious unit. The statute ensures that parents will have the opportunity to guide and counsel their daughter, and play a supportive role during and after the pregnancy.[12]

[12] Mrs. Jean Hunerwadel, the intervenor, holds a B.S. in Early Childhood Education and Child Development from St. Joseph's College, West Hartford, Conn. She has worked at the James Jackson Putnam Children's Center Clinic for emotionally disturbed pre-school children and as a kindergarten teacher and director of a nursery school. Mrs. Hunerwadel's testimony concerning the role of parents is pertinent and helpful:

> "Q. Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?
>
> "A. Yes, there are.
>
> "Q. Tell us what those circumstances would be.
>
> "A. We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of

The majority attack the statute because it requires the consent of both parents. Parental rights and duties, however, inhere in both parents by reason of their parenthood

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the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.

"We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; that that would not be the end of our involvement.

"We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.

"We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.

"And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.

"So those kinds of decisions would be very important to us to help her to make."

(January 28, 1975, Transcript pp. 77-78.)

The testimony of each medical expert, whether called by the plaintiffs or defendants, establishes the validity of Mrs. Hunerwadel's position. While the experts differ concerning the necessity for parental consent, each indicated that parental involvement in the abortion decision is helpful, benefits the child, and should be encouraged. Tr. of testimony of Dr. Somers H. Sturgis, emeritus professor in gynecology at Harvard University, Dec. 7, 1974, p. 27, Dec. 30, 1974, pp. 5-6, 8-9, 19; Tr. of testimony of Dr. Jane E. Hodgson, associate professor of obstetrics and gynecology at the University of Minnesota, Dec. 7, 1974, pp. 66-67, Dec. 30, 1974, pp. 75-77, 80-81; Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, Dec. 30, 1974, pp. 115-116, 119-121, 130; Tr. of testimony of Dr. Jules Rivkind, chairman of the

and are guaranteed equally to both parents by the Constitution. The statute before us recognizes that one parent cannot lawfully usurp the rights and duties of the other, *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975),[13] and requires the consent of both except as otherwise provided in the statute.

Minors, of course, possess constitutional rights. Constitutional rights, however, are not absolute. Their exercise may be made subject to reasonable conditions.[14] The constitutional right of an adult woman to have an abortion, for example, has been conditioned by the Supreme Court upon the concurrence of a physician in her decision. The purpose of the condition is to provide a safeguard against the possibility of a medically inadvisable decision. See *Roe* v. *Wade,* 410 U.S. at 153. With respect to minors, the power of the state to limit or regulate the exercise of constitutional rights has been recognized by the Supreme Court. In *Ginsberg* v. *New York,* 390 U.S. 629 (1968), the Court, at page 638, states:

> "... [W]e have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults ....' *Prince* v. *Massachusetts,* 321 U.S. 158, 170."

Department of Obstetrics and Gynecology at Mercy Hospital, Pittsburgh, Pa., Jan. 28, 1975, pp. 15-18; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, Jan. 28, 1975, pp. 47-50, 63-64.

[13] At page 4398: "And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' "

[14] "We . . . conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Roe* v. *Wade*, 410 U.S. 113, at 154.

See also *United States* v. *Bisceglia*, 43 U.S.L.W., 4242, 4243 (U.S. Feb. 19, 1975).

And again at page 639:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince* v. *Massachusetts,* supra, at 166."

I find, therefore, no conceivable constitutional objection to legislation providing in the case of a pregnant minor an additional condition designed to make certain that she receive parental or judicial guidance and counselling before having the abortion. The requirement of consent of both parents[15] ensures that both parents will provide counselling and guidance, each according to his or her best judgment. The statute expressly provides that the parents' refusal to consent is not final. The statute expressly gives the state courts the right to make a final determination. If the state courts find that the minor is mature enough

[15] The majority speculate concerning possible interpretations of the "for good cause shown" language. There is also some doubt whether the statute requires consent of one or both parents. The construction of the statute is a matter of state law. If the majority believe the only constitutional infirmities arise from their interpretation of the statute, the majority should certify questions of state law to the Supreme Judicial Court of Massachusetts pursuant to Rule 3:21 of that court in order to receive a definitive interpretation of the statute. See *Hendrickson* v. *Sears*, 495 F.2d 513 (1 Cir. 1974).

to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion. There is no basis for a contrary assumption.[16] In the case of an adolescent girl who finds herself in an emotional crisis of this kind it is important to make certain that she receive guidance and support from her parents who normally, more than any other person, have the strongest natural interest in her welfare. In the event that the parents refuse their consent, guidance and support will be provided by the state court judge in his role of parens patriae. The requirement of parental consent makes it necessary that the parents be informed and consulted about the girl's serious problem. The girl's condition would not then be concealed from her parents as has been done in this case with the cooperation of this Court as though her parents, whom we do not know and have not heard, were her natural enemies and not her natural guardians.

Parental rights and duties are recognized and guaranteed by the Constitution as necessary to the welfare of the minor children themselves, as well as of the family of which they are a part. The state has a compelling interest in the protection of these parental rights and duties. The statute is necessary to protect this compelling interest and is narrowly drawn to do just this. The statute is constitutional. *Planned Parenthood* v. *Danforth,* Civ. No. 74-416 C(A) (E.D. Mo. 1975), enforcement stayed, 43 U.S.L.W. 3451 (U.S. Feb. 14, 1975). The statute before us is specifically designed to protect pregnant minors under 18 years of age against their own improvidence due to immaturity of judgment, and against overreaching by others.[17] The enactment

[16] "Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsi-

of such a statute is a valid exercise of the state's police power and also of its power as parens patriae. *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

The statute is a proper exercise of constitutional power by the Commonwealth of Massachusetts and is therefore valid. The decision of the majority deprives the defendants and the parents of the minor plaintiff of their legal rights without due process of law.

For these reasons I dissent from the decision of the majority.

(s) ANTHONY JULIAN
U. S. Senior District Judge

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bilities. This we refuse to do." *Huffman* v. *Pursue, Ltd.*, 48 U.S.L.W. 4379, 4385 (U.S. March 18, 1975).

[17] Massachusetts, like other states, has many laws, both decisional and statutory, designed to protect minors from their own improvidence and from possible overreaching. *See, e.g., Commonwealth* v. *Nickerson*, 87 Mass. (5 Allen) 518 (1863); M.G.L. c. 10, § 29; c. 90, §§ 8, 8A, 8B, 10; c. 105, § 3-207; c. 119, c. 127, § 22; c. 128A, § 10; c. 131, § 14; c. 138, § 34; c. 140, §§ 122, 130, 131, 179, 198; c. 147, § 35; c. 149; c. 191, § 1; c. 207, §§ 7, 9, 24, 25; c. 208, § 30; c. 210, §§ 2, 5A; c. 248, § 35; c. 265, §§ 13B, 22A; 23, 24B; c. 269, §§ 12A, 12B; c. 270, § 6; c. 272, §§ 1, 4, 28, 35A, 58.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

ORDER

In accordance with our opinion of April 28, 1975, Section P of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

(s) BAILEY ALDRICH
U. S. Circuit Judge

(s) FRANK H. FREEDMAN
U. S. District Judge

April 28, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL, for herself and all others similarly situated,

DEFENDANT-INTERVENOR.

SUBSTITUTE

ORDER

Inadvertencies in the order entered April 28, 1975 are hereby corrected by substituting therefor the following order as of April 28, 1975, nunc pro tunc.

In accordance with our opinion of April 28, 1975, Section 12P of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

(s) BAILEY ALDRICH
U. S. Circuit Judge

(s) FRANK H. FREEDMAN
U. S. District Judge

May 9, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendants, Francis X. Bellotti, Attorney General for the Commonwealth of Massachusetts, Garrett Byrne, District Attorney of the County of Suffolk, Commonwealth of Massachusetts and the District Attorneys for all other counties in the Commonwealth of Massachusetts, hereby appeal to the Supreme Court of the United States from the order entered by this Court on April 28, 1975 and as amended by this Court's Substitute Order entered May 9, 1975, which declared Section 12P of the Massachusetts General Laws Chapter 112, and such other portions of the chapter insofar as they make specific reference thereto, unconstitutional and void, and enjoined the defendants from enforcement thereof. Said statute makes it a criminal offense to perform an abortion

upon a minor without the consent of both parents as well as that of the minor, with certain exceptions, the most important being that the parents' refusal may be overruled by a superior court judge "for good cause shown".

This Appeal is taken pursuant to 28 U.S.C. § 1253.

By their attorney

(s) MICHAEL EBY

MICHAEL EBY

Assistant Attorney General

CERTIFICATE OF SERVICE

I, Michael Eby, a member of the bar of the United States District Court for the District of Massachusetts, hereby certify that I have mailed a copy of the within Notice of Appeal to Brian A. Riley, Esquire, Suite 504, 100 Charles River Plaza, Boston, Mass., and Roy Lucas, Esquire, 27 State Street Boston, Mass., on this 16th day of May, 1975.

(s) MICHAEL EBY

MICHAEL EBY

filed May 16, 1975